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No. 868.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY, and AUTO CONVOY CO.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORTS, INC.,
Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma.

REPLY TO MOTIONS TO AFFIRM.

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REPLY TO MOTIONS TO AFFIRM.

The Motions to Affirm are premised entirely upon one glaring fallacy, to-wit: that the issues presented in this case have been disposed of by this Court in **Motor Convoy, Inc. v. United States,** 235 F. Supp. 250, affirmed 381 U. S. 436. The Motions to Affirm elaborate upon this initial fallacy by a discussion of the merits of the case as it was before the Commission.

To highlight the nature of this fallacy, we point out that

The appellants (plaintiffs below) have limited this appeal to two basic issues;

(a) Did the Commission comply with the Administrative Procedure Act, 5 U. S. C., § 1001, et seq., by refusing to grant the appellants a hearing with the right to cross-examination?

(b) Did the Commission comply with the Administrative Procedure Act thereof by refusing to state the reasons, basis and fact findings supporting the ultimate conclusion that public convenience and necessity required the granting of the certificates sought by Kenosha Auto Transport and Commercial Carriers in the subject cases?

The **Motor Convoy Case**, supra, is similar to the present case **only** in that it too involved an application to transport automobiles and was purportedly an application encouraged by the so-called **N. A. T. A. Case**, 91 M. C. C. 395.*

But the **Motor Company** decision, affirmed per curiam by this Court, makes no reference to the Administrative Procedure Act or the Commission's obligations under that Act. Instead, the Georgia Court in **Motor Convoy** addressed itself solely to the substantive regulatory facts involved and held, in a decision expressly limited to the particular facts of that case, that the Commission's action in that case was sustainable.

The appellants here assert fundamentally that whatever the Commission has done on the merits cannot be properly reviewed at this time, and is not relevant, because of the Commission's failure to comply with procedural requirements imposed by the Administrative Procedure Act. This argument has been brutally ignored by the Commission; by the respondents; by the majority of the lower court. Only the dissenter below, Judge Bohanon, has addresssed himelf to the only issue we raise.

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* National Automobile Transporter Assn. Petition for Declaratory Order, 91 M. C. C. 395.

THE LOWER COURT'S DECISION CANNOT BE PERMITTED TO STAND AS AN AUTHORITIVE INTERPRETATION OF THE INTERSTATE COMMERCE ACT.

The majority of the three-judge district court, assumed in its opinion that the Kenosha and Commercial Carriers applications were not applications for certificates of public convenience and necessity requiring proof thereof under § 207 (a) of Part II of the Interstate Commerce Act, but were "petitions for modification" of existing authority held by Kenosha and Commercial.

While the title of the application was "Petition for Modification," even the Commission was careful to point out in the **N. A. T. A.** case that the "petitions" would be treated as applications under § 207 (a). See **N. A. T. A.**, 91 M. C. C. 395, 415 (?). These so-called "petitions" resulted in the granting of new authority never before held by Kenosha and Commercial Carriers. The dissenter below, Judge Bohanon, exploded this myth which lies at the bottom of the extremely dangerous opinion of the majority of the lower court.

The real danger and gross legal error which stems from this fallacy is that because of the label "Petition for Modification" the lower court appears to assume that proof of public convenience and necessity is dispensed with in this type of application proceeding. To appellant's great surprise, counsel for the Commission in the lower court, even asserted that the applicants did not have to prove public convenience and necessity.

Even counsel for Kenosha in his Motion to Affirm continues this error when he complains (p. 2, Motion to Affirm of Kenosha Auto Transport) that we, the appellants, would have Kenosha prove its case in this proceeding when Kenosha's existing authority was proven, with re-

spect to public need, "years ago"; a direct assertion that proof of public convenience and necessity proven "years ago" is adequate to sustain a grant of authority now.

We challenge opposing counsel, the Commission and the United States to find one shred of authority that an application filed under § 207 (a) of Part II of the Interstate Commerce Act (which there are according to the Commission) can be granted based upon proof adduced "years ago" in a separate proceeding under entirely distinct economic circumstances.

We further challenge the opposition to find in **Motor Convoy,** supra, or this Court's per curiam affirmance thereof, one hint that proof adduced "years ago" can support the grant of a certificate of public convenience and necessity today. The Georgia Court in **Motor Convoy,** and presumably this Court, did not even address themselves to this question.

The unfortunate and unintended (we believe) result of **Motor Convoy's** affirmance has been to lead the lower courts in the errors referred to herein. Win, lose or draw, this Court should note probable jurisdiction to straighten out a legal mess and to decide once and for all whether the Commission is entitled to ignore the Administrative Procedure Act merely because an application for a certificate of public convenience and necessity is labelled, by an ad hoc Commission decision, a "petition for modification."

If the Commission is permitted to continue to believe that it can grant a certificate of public convenience and necessity without current up-to-date proof thereof, the result will be a dismantling of the existing regulatory system, for the sake of administrative expediency, to the detriment of those carriers which invested their fortunes premised upon that system.

CONCLUSION AND PRAYER.

Wherefore, these Appellants respectfully pray that this Court note jurisdiction, require the matter to be heard upon briefs and argument to the end that judicial certainty may supplant administrative expediency.

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